Tye Chwee Hoon v Cayman Commodities (M) Sdn Bhd & Anor

HIGH COURT (PENANG) — SUIT NO 22-152-1988
MOHAMED DZAIDDIN J
12 SEPTEMBER 1989

Civil Procedure — Garnishee — Application to show cause — Whether proposed garnishment void by virtue of the judgment debtor being subject of a winding-up petition — Whether garnishee was in fact indebted to the judgment debtor — Companies Act 1965, ss 219(2) & 224

The plaintiff's claim against the first defendant was for a refund of the sum of $125,149.36, being moneys paid by her in respect of future commodities trading transactions. The plaintiff also sued the second defendant for recovery of the said amount under the provisions of the Commodities Trading Act 1985 ('the Act') being moneys kept by the first defendant as statutory deposit held by the second defendant. On 18 November 1988, the plaintiff obtained final judgment against the first defendant in terms of her statement of claim. She proceeded to apply as judgment creditor for a garnishee order against the second defendant as garnishee. On 22 November 1988, the registrar granted the said order under O 49 r 1(2) of the Rules of the High Court 1980 whereby all debts due or accruing from the second defendant to the first defendant as judgment debtor be attached to answer the judgment recovered against the first defendant by the plaintiff vide judgment dated 18 November 1988. The hearing of the application showing cause against the said garnishee order to be made absolute under O 49 r 5 was heard on 2 December 1988 and the registrar refused to make the garnishee order absolute. The plaintiff appealed against this decision.

Held, dismissing the plaintiff's appeal:

(1) Section 219(2) of the Companies Act 1965 clearly provides that in the case of a winding up by the court, the winding-up date shall be deemed to have commenced from the presentation of the petition.

(2) The fact of a winding-up order is to avoid all disposition of the property (including things in action) of the company made between the commencement of the winding up, ie the presentation of the petition and the winding-up order.

(3) Therefore, s 224 clearly provides that any attachment or execution against the property of the company after commencement of the winding up is void. As the winding-up petition against the first defendant had commenced well before the garnishee proceeding was taken in November 1988, the garnishee order made ex parte dated 22 November 1988 is therefore void.

(4) The second defendant was never indebted to the first defendant and as such O 49 r 1 does not apply here.

Case referred to

1 *Tye Chwee Hoon* v *Cayman Commodities (M) Sdn Bhd & Anor* [1989] 2 MLJ 317 (folld)

Legislation referred to

Companies Act 1965 ss 219(2), 224
Rules of the High Court 1980 O 49 rr 1, 5

Yeap Chye Choon for the plaintiff.
Haji Sulaiman bin Abdullah for the second defendant.

Cur Adv Vult

Mohamed Dzaddin J: This is an appeal by the plaintiff in her capacity as judgment creditor against the decision of the registrar given on 22 March 1989 refusing to order that the garnishee order be made absolute.

The facts of the case are quite straightforward. The plaintiff's claim against the first defendant was for a refund of the sum of $125,149.36, being moneys paid by her in respect of future commodities trading transactions. The plaintiff also sued the second defendant for recovery of the said amount under the provisions of the Commodities Trading Act 1985 ('the Act'), being moneys kept by the first defendant as statutory deposit held by the second defendant. On 18 November 1988, the plaintiff obtained final judgment against the first defendant in terms of her statement of claim. Then, on the same day, she proceeded to apply in her capacity as the judgment creditor for a garnishee order against the second defendant as garnishee. On 22 November 1988, the registrar granted the said order under O 49 r 1 (2) Rules of the High Court 1980 whereby all debts due or accruing from the second defendant to the first defendant as judgment debtor be attached to answer the judgment recovered against the first defendant by the plaintiff vide the judgment dated 18 November 1988. It is quite clear from the supporting affidavit of the plaintiff (encl 25) in her application that the basis of her claim against the second defendant as garnishee was that the latter was in custody of the sum of $750,000, being the statutory deposit paid by the first defendant under the Act.

The hearing of the application showing cause against the said garnishee order being made absolute under O 49 r 5 was heard on 2 December 1988. The garnishee, through their solicitors, filed an affidavit opposing the application on the following grounds:

(1) as the first defendant company was subject to a winding-up petition in Penang High Court Company Winding-up Petition No 35/87, by virtue of ss 219(2) and 224 of the Companies Act 1965, the proposed garnishment attachment or execution was void;
(2) there was a pending application by the garnishee in his capacity as second defendant to strike out the plaintiff's writ of summons and the statement of claim;
(3) the garnishee was not indebted to the judgment debtor since the statutory deposit of $750,000 was held by the garnishee in accordance with the provisions of the Act.

After hearing counsel, the learned registrar refused to make the garnishee order absolute. Before me, Encik Yeap, for the plaintiff, submitted that both ss 219(2) and 224 of the Companies Act 1965 do not apply. Secondly, counsel submitted that there was a regular judgment obtained against the first defendant and what the plaintiff did was merely to garnish money which the first defendant had deposited with the second defendant.

Having reviewed the matter, in my judgment, the learned registrar was correct in coming to his decision for

not making the garnishee order absolute. My reasons are as follows.

First, s 219(2) of the Companies Act 1965 clearly provides that in the case of a winding up by the court, as opposed to voluntary winding up under sub-s (1), the winding-up date shall be deemed to have commenced from the presentation of the petition. Secondly, the fact of a winding-up order is to avoid all disposition of the property (including things in action) of the company made between the commencement of the winding up, ie the presentation of the petition and the winding-up order. Therefore, s 224 clearly provides that any attachment or execution against the property of the company after the commencement of the winding up is void. Hence, in the present case, as the winding-up petition against the first defendant had commenced well before the garnishee proceeding was taken in November 1988, the garnishee order made ex parte dated 22 November 1988 is therefore void. Further, there is no basis for me to exercise my powers under s 298(1)(c) Companies Act 1965.

Thirdly, the second defendant was never indebted to the first defendant and as such O 49 r 1 does not apply here. My decision on 9 January 1989 (encl 39)[1] is settled on this issue.

For the above reasons, this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Yeap Chye Choon & Co; Zain & Co.*

Reported by *Kevin Mathews*

Public Prosecutor v Tan Huang Hiang

HIGH COURT (IPOH) — PERAK CRIMINAL TRIAL NO 7 OF 1984
PEH SWEE CHIN J
6 SEPTEMBER 1989

Criminal Law — Dangerous drugs — Trafficking in — Presumptions — Circumstantial evidence — Whether inconsistent with any hypothesis other than that of guilt — Dangerous Drugs Act 1952, ss 37(b), (d) & 39B

Criminal Procedure — Statements — Recording of statement or words of accused during arrest or interrogation — Whether obligation to record such statement or words mandatory or directory — Circumstances of case — Criminal Procedure Code (FMS Cap 6), s 112

Evidence — Circumstantial evidence — Whether inconsistent with any hypothesis other than that of guilt — Primary evidence not tendered before court — Whether secondary evidence admissible — Evidence Act 1950, ss 27, 61, 62, 63, 64, 65 & 66

The accused was charged with trafficking in dangerous drugs in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952. On the day of the arrest, the accused was initially arrested for another offence which he was not charged for at some distance away from the place of the offence for which he was charged. The accused was searched and two bunches of keys were found. The prosecution's evidence was that the accused said that the keys were to his house and a shoe factory at no 1422 Buntong, and that he kept some dadah (drugs) and could bring him there ('the crucial words'). The inspector then lodged a report after discovery of the exhibits but failed to mention the words from the accused about keeping the dadah in the house. Further, he did not mention the bunches of keys recovered from the accused in his report. Neither did he jot down in his diary what the accused said until the next day. Under cross-examination, the inspector was shown by the defence that he was in breach of s 112 of the Criminal Procedure Code ('CPC') but he denied that he was interrogating the accused under that section. Further, he denied having severely assaulted the accused.

Held, acquitting the accused:

(1) Except for the crucial words, the prosecution's evidence against the accused was entirely circumstantial. The court had to bear in mind that such circumstantial evidence, to be sufficient to sustain a conviction, must be inconsistent with any other hypothesis other than that of the guilt of the accused.

(2) It was more probable than not that two other persons had each a complete set of keys to the factory premises. Further, the landlady was living at the back portion which was not sealed off from the front portion where the factory was. On such evidence, it would be quite impossible to say that it must be the accused who had hidden the drugs in the room in that house, except for the crucial words.

(3) There was not the slightest doubt that the statement of the accused while under interrogation was not reduced into writing. Section 112(i) of the CPC applies equally to both accused persons and witnesses as the reading of the proviso to sub-s (ii) made it more applicable to accused persons than witnesses.

(4) The failure to reduce into writing those crucial words would not render them inadmissible. The court considered the reality of urgency of the situation. Further, the provisions of